

NOT FOR PUBLICATION

NO. 25215

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.
ZACHARY LANE PAU, aka Zachery Pau, Defendant-Appellant

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 01-1-1725)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Zachary Lane Pau (Pau), also known as Zachery Pau, appeals the Amended Judgment filed on July 18, 2002 in the Circuit Court of the First Circuit (circuit court).¹

On appeal, Pau contends the circuit court erred by allowing a prejudicial hearsay statement into evidence.

I. FACTS

On August 7, 2001, Pau was charged by complaint with Count I: Terroristic Threatening in the First Degree, in violation of Hawaii Revised Statutes (HRS) § 707-716(1)(d)

¹ The Honorable Karen S.S. Ahn presided.

(1993)²; and Count II: Assault in the Third Degree, in violation of HRS § 707-712(1)(a) (1993).³

A jury trial was held on April 4, 2002. Vernon Nobriga (Nobriga), the complaining witness, testified that on July 2, 2001 at approximately 7:45 p.m., he was working at Mel's Video located at 20 North Hotel Street. From inside the video store, Nobriga observed Pau blocking the doorway to the store. Nobriga opened the door while Pau's back was to him. Nobriga put his

² Hawaii Revised Statutes (HRS) § 707-715 (1993) provides:

§707-715 Terroristic threatening, defined. A person commits the offense of terroristic threatening if the person threatens, by word or conduct, to cause bodily injury to another person or serious damage to property of another or to commit a felony:

- (1) With the intent to terrorize, or in reckless disregard of the risk of terrorizing, another person; or
- (2) With intent to cause, or in reckless disregard of the risk of causing evacuation of a building, place of assembly, or facility of public transportation.

HRS § 707-716 (1993) provides in relevant part:

§707-716 Terroristic threatening in the first degree.

(1) A person commits the offense of terroristic threatening in the first degree if the person commits terroristic threatening:

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- (d) With the use of a dangerous instrument.

(2) Terroristic threatening in the first degree is a class C felony.

³ HRS § 707-712 (1993) provides in relevant part:

§707-712 Assault in the third degree. (1) A person commits the offense of assault in the third degree if the person:

- (a) Intentionally, knowingly, or recklessly causes bodily injury to another person[.]

. . . .

- (2) Assault in the third degree is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

hand on Pau's back, and Pau stepped forward onto the sidewalk. Nobriga testified Pau told him that "it was a public sidewalk and he [Pau] could be there." Nobriga and Pau got into an argument about whether a certain area was a sidewalk or part of the store. Nobriga testified that Pau kicked him in his thigh area, he pushed Pau away, and then Pau hit him in the face. Nobriga hit Pau back, and they got into a fight.

Nobriga testified that he was going back into the store when he heard footsteps, looked back, and saw Pau coming after him. Nobriga then hit Pau a couple more times. Nobriga testified that Pau then pulled out a knife about six inches in length. Nobriga could not see the handle of the knife because Pau's hand was covering the handle. Pau thrust his right hand holding the knife forward at least six or seven times toward Nobriga. Nobriga was backing away while Pau was thrusting his hand forward. Pau did not stab Nobriga with the knife, nor did Pau take off his watch and try to hit Nobriga with the watch. Nobriga then tried to kick Pau, but Nobriga fell down. After Nobriga got up, he observed Pau crossing the street, heading in the direction of Nu'uaniu Avenue. Nobriga saw a police officer, who asked him if he were okay. Nobriga and the officer went into the video store where the officer made out a report.

Police Officer Kristen Killam (Officer Killam) testified that she was on duty in the Hotel Street sector on

July 2, 2001. While driving down Hotel Street, Officer Killam saw two males standing on Hotel Street, one facing toward her (who she identified as Nobriga) and the other facing away from her ("unknown male"). She observed Nobriga "back pedaling" up onto the sidewalk area. The unknown male was following Nobriga while thrusting his hand forward toward Nobriga. Officer Killam testified that she thought the unknown male who was thrusting his hand was holding a screwdriver. After she called out to get their attention, the unknown male started running down Hotel Street toward Nu'uaniu Avenue. Officer Killam never saw the face of the unknown male.

Officer Killam testified that she interviewed Nobriga in the video store. There were several people who came in the store and wanted to tell her what had happened, but these people did not want to give her a statement or tell her who they were. She also testified that a man walked into the video store and said "oh, I saw Zach trying to stab him"; defense counsel objected to this statement and moved for a mistrial. The circuit court denied the motion for mistrial, struck the statement from the record, and instructed the jury to disregard the statement.

Officer Killam testified that while she was in the police substation in Chinatown at approximately 6:00 a.m. on July 3, 2001, someone called the substation and told her that the male "from the flight [sic]" was at Smith Union Bar. Officer

Killam testified that she "automatically assumed" it was Pau "because the only person that had run from me was the person identified as Zach Pau." Officer Killam went to the doorway of the bar and shouted "Zach" to see if anyone would respond. In court, she identified Pau as the same person who acknowledged that he was Zach when she shouted in the bar. Officer Killam stated that she did not arrest Pau because she did not have probable cause to arrest him, Pau was larger and probably stronger than she was, and Pau had a knife (she was concerned for her safety).

On cross-examination, Officer Killam confirmed she had testified that she thought Pau was holding a screwdriver. She admitted that the incident report she wrote referenced a silver-colored object and did not reference a screwdriver. Officer Killam stated that she put in her report what she saw and that her report was not supposed to include her opinion as to what she saw. She explained it was her opinion that she saw a screwdriver in Pau's hand. Defense counsel asked her if she had intentionally omitted from her report that she saw a silver object that looked like a screwdriver; she denied it. Defense counsel then asked, "This is your opinion and therefore you won't include it?" Officer Killam stated "No" and added, "Maybe at the time, because afterwards I'd learned it was a knife, other witnesses had told me it was a knife, whatever the case may be --

it got omitted." Defense counsel asked that her response be stricken. The prosecutor asked that her response stand because it was responsive to the question. Defense counsel stated that her response was not responsive, was prejudicial, and should be stricken. The court overruled the objection and deemed it a reasonable response. Later, defense counsel moved for a mistrial based partly on Officer Killam's statement that other people saw Pau with a knife. The circuit court denied the motion for mistrial.

Pau testified that on July 2, 2001, at about 7:45 p.m., he was walking on Hotel Street toward Mel's Video. As Pau walked past the video store, he swerved around some people standing in front of the store and then was shoved hard in the back of his neck by Nobriga. Pau testified that after Nobriga pushed him, he pushed Nobriga, and Nobriga started swinging at him. From the sidewalk, Pau and Nobriga went into the street, began to "scuffle," and then went back onto the sidewalk. Pau pushed Nobriga away from him, and Nobriga tripped and fell down. Nobriga got up and kicked Pau in the stomach. Pau decided that he had had enough and ran away towards Nu'uano. Pau denied possessing or drawing a knife. Pau testified that he had a silver-colored, expandable wristwatch on at the time of the incident. During the scuffle, the watch band became loose and Pau held the watch in this right hand. Pau testified that his

watch was taken from him when he was taken into custody, and he signed a property list that set forth the things in his possession at the time of his arrest.

Police Officer Ermie Barroga testified that he arrested Pau on August 1, 2001, but did not witness the incident between Pau and Nobriga.

On April 9, 2002, the jury found Pau guilty of Terroristic Threatening in the First Degree and Assault in the Third Degree. On July 18, 2002, an Amended Judgment was entered. Pau timely filed this appeal.

II. STANDARD OF REVIEW

A. Evidentiary Rulings/Hearsay

"We apply two different standards of review in addressing evidentiary issues. Evidentiary rulings are reviewed for abuse of discretion, unless application of the rule admits of only one correct result, in which case review is under the right/wrong standard." State v. Ortiz, 91 Hawai'i 181, 189, 981 P.2d 1127, 1135 (1999) (internal quotation marks and citations omitted).

We apply the right/wrong standard of review to questions of hearsay:

The requirements of the rules dealing with hearsay are such that application of the particular rules can yield only one correct result. HRE Rule 802 (1993) provides in pertinent part that hearsay is not admissible except as provided by these rules. HRE Rules 803 and 804(b) (1993) enumerate exceptions that are not excluded by the hearsay rule. With respect to the exceptions, the only question for the trial

court is whether the specific requirements of the rule were met, so there can be no discretion. Thus, where the admissibility of evidence is determined by application of the hearsay rule, there can generally be only one correct result, and the appropriate standard for appellate review is the right/wrong standard.

Ortiz, 91 Hawai'i at 189-90, 981 P.2d at 1135-36 (internal quotation marks, citations, footnote, and brackets omitted) (quoting State v. Christian, 88 Hawai'i 407, 418, 967 P.2d 239, 250 (1998)).

III. DISCUSSION

A. The circuit court erred by not striking the improper testimony of a witness.

Pau contends the circuit court erred by refusing to strike the testimony of Officer Killam because the testimony was prejudicial hearsay and non-responsive. The State contends that Pau waived his right to appeal the issue of hearsay because his counsel objected on the grounds of non-responsiveness and prejudice. The State further argues that the witness's statement was not hearsay, and, if it were hearsay, it was harmless error to allow it into evidence.

In Garcia v. Commonwealth of Virginia, 21 Va. App. 445, 464 S.E.2d 563 (1995), the Court of Appeals of Virginia held that:

When a party's question calls for inadmissible testimony, that party can object to the answer only if it is nonresponsive. However, when the question from a party does not necessarily call for inadmissible evidence or call for a hearsay response from a witness, a party is not precluded from objecting to unanticipated inadmissible evidence. A party is precluded from objecting to an otherwise

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inadmissible answer that it has elicited only when the question itself calls for inadmissible evidence.

Id. at 449-50, 464 S.E.2d at 565 (citations omitted).

"Questioning counsel has the right to object on the ground solely that an answer is nonresponsive." Ingoglia v. State of Maryland, 102 Md. App. 659, 666, 651 A.2d 409, 412 (1995) (internal quotation marks, citation, and ellipsis omitted). "The proper remedy for a non-responsive or improper answer to a proper question is to have the answer stricken." State v. Corella, 79 Hawai'i 255, 265, 900 P.2d 1322, 1332 (App. 1995).

During cross-examination of Officer Killam, the following exchange took place:

Q [DEFENSE COUNSEL] Okay. And at the time all you felt it was important to do, after all your training, was to say that it looked like -- it was a silver colored object in Mr. Pau's hand.

A [OFFICER KILLAM] That is what I put there.

Q That's right. And this was made -- this was dated July 2nd, 2001; correct?

A Yes, it was.

Q Right after the incident.

Now, when did you come to the opinion that it looked like a screwdriver?

A When I was driving towards the scene.

Q So when you're driving toward the scene, you said, gee, it looks like this person -- to yourself, this person has a silver object that looks like a screwdriver in his hands, you carried out the rest of your investigation, and when it came time to putting it in the report you intentionally omitted that because you --

A I didn't intentionally --

THE COURT: Wait, wait, wait, One at a time.

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Q [DEFENSE COUNSEL] This is your opinion and therefore you won't include it?

A [OFFICER KILLAM] No. If you've ever written a police report, sometimes when you're writing, you're just writing what comes off right now what you're thinking, what you can remember right off the top of your head.

Maybe at the time, because afterwards I'd learned it was a knife, other witnesses had told me it was a knife, whatever the case may be --

Q Excuse me?

A -- it got omitted.

Q Request that the response be stricken in terms of its --

[PROSECUTOR]: Judge, it's responsive to the question. I'm going to ask that it stand.

[DEFENSE COUNSEL]: I disagree. I don't believe it was responsive and request that it be stricken. It's clearly prejudicial.

THE COURT: I'm going to overrule the objection. I think it was a reasonable response.

Please proceed.

Defense counsel questioned Officer Killam about setting forth her opinions in her police report. Defense counsel's question was not designed to elicit Officer Killam's statement that other witnesses told her it was a knife. Defense counsel timely moved to strike Officer Killam's statement on the grounds of non-responsiveness and prejudice. Officer Killam's statement was not responsive to defense counsel's query why Officer Killam wrote that Pau had a silver object in his hand versus her opinion at trial that she thought Pau was holding a screwdriver.

The State's contention that Officer Killam's testimony was not hearsay is erroneous. "'Hearsay' is a statement, other

than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hawaii Rules of Evidence Rule 801(3) (1993). The State contends the context of Officer Killam's statement was to explain why she had omitted from her report that she thought Pau was holding a screwdriver. A statement that Officer Killam learned Pau was holding a knife "because afterwards I'd learned it was a knife, other witnesses had told me it was a knife" did not explain why she failed to write in her report that she thought it was a screwdriver and instead called it a silver object. Officer Killam's statement is hearsay because "other witnesses" made a statement, not at trial or at a hearing, offered to prove that Pau was holding a knife.

The State's contention that the admission of the hearsay statement was harmless error is also erroneous. Under the harmless error standard, this court must "determine whether there is a reasonable possibility that the error complained of might have contributed to the conviction." State v. Pauline, 100 Hawai'i 356, 378, 60 P.3d 306, 328 (2002) (internal quotation marks and citation omitted).

In Ingoglia v. State of Maryland, supra, in response to defense counsel's question about what the detective told other people in the investigation unit, a police detective stated that a traffic investigation unit concluded the collision of two cars

was not an accident. 102 Md. App. at 664-66, 651 A.2d at 411-12. Defense counsel objected on the ground of non-responsiveness and was overruled by the court. Id. at 665-66, 651 A.2d at 412. The Court of Special Appeals of Maryland stated:

The case hinged on whether the trier of fact believed, as the State contended, that appellant deliberately ran over the victim or, as the defense contended, that the incident was an accident. As appellant observes, "the court's ruling resulted in the admission of extremely damaging hearsay testimony bearing on the critical issue in the case." Under the circumstances, it cannot be said that "there is no reasonable possibility that the evidence complained of may have contributed to the rendition of the guilty verdict." Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665 (1976) (footnote omitted).

102 Md. App. at 666-67, 651 A.2d at 412 (ellipsis omitted).

To convict Pau of Terroristic Threatening in violation of HRS § 707-716(1)(d), the State needed to prove that he used a dangerous weapon while committing the offense. The case hinged on whether the jury believed the testimony of Officer Killam and Nobriga that Pau was carrying a dangerous instrument (a knife, screwdriver, or silver object) or whether the jury believed the testimony of Pau that the silver object was his watch and not a dangerous instrument. The introduction of "I'd learned it was a knife, other witnesses had told me it was a knife" was a damaging hearsay statement bearing on the critical issue of whether Pau used a dangerous instrument. Therefore, there is a reasonable possibility that the evidence complained of may have contributed to the conviction.

The introduction of the hearsay statement by Officer Killam was harmless error as to Count II, Assault in the Third Degree, HRS § 707-712(1)(a). Under HRS § 707-712(1)(a), the State needed to prove that Pau intentionally, knowingly, or recklessly caused bodily injury to Nobriga. Nobriga testified that Pau kicked him on the thigh and hit him in the face before pulling out a knife; he backed away from Pau when Pau lunged at him; and Pau ran across the street after he tried to kick Pau. There was no bodily contact between Pau and Nobriga after Pau allegedly pulled out a knife. Pau testified that he hit and pushed Nobriga in self-defense. The issue of use of a dangerous weapon is not relevant to the charge of violating HRS § 707-712(1)(a). The jury could only have convicted Pau of assault based on his actions prior to his alleged use of a dangerous instrument because Pau did not make contact with Nobriga after he allegedly pulled out a knife. Therefore there is no reasonable possibility that the evidence complained of contributed to the assault conviction.

IV. CONCLUSION

The Amended Judgment filed on July 18, 2002 in the Circuit Court of the First Circuit is vacated as to Count I (Terroristic Threatening in the First Degree) and is affirmed as to Count II (Assault in the Third Degree). This case is remanded

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to the circuit court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, March 25, 2004.

On the briefs:

Joseph R. Mottl III
for defendant-appellant.

Chief Judge

Mark Yuen,
Deputy Prosecuting Attorney,
City and County of Honolulu,
for plaintiff-appellee.

Associate Judge

Associate Judge